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ABSTRACT

The rapid growth of law and litigation in schools during the last several decades has made it critically important that school districts secure good legal advice and representation. This pamphlet is designed to address this need of the New Jersey School Boards Association (NJSBA) membership by providing information on how to select, compensate, and work with a school board attorney. The first section, on selection of an attorney, outlines an appropriate job description, including litigation, attendance at board meetings, consultation and advice, and preparation and review of documents. Qualifications are then discussed, along with advice on obtaining applications, conducting interviews, and checking references. The second section provides suggestions for working with the school board attorney: (1) seek advice early; (2) give the attorney adequate time to respond; (3) help the attorney assume the proper role; (4) work on better methods of communication and evaluation; and (5) what to do if problems persist. The third section discusses a set of alternative plans for compensating the board attorney: full-time counsel, general retainer agreements, limited retainer agreements, and no retainer. The NJSBA recommends that every board seek a fee arrangement that includes a retainer to cover telephone consultations at no additional charge per call. Also discussed are the written agreement, average district expenditures for legal services, and tips for controlling costs. The concluding section describes services available to school board attorneys from the legal staff maintained by the NJSBA. Appended are results of an NJSBA survey of chief school administrators conducted in spring 1982 on the subject of school district legal services. (TE)

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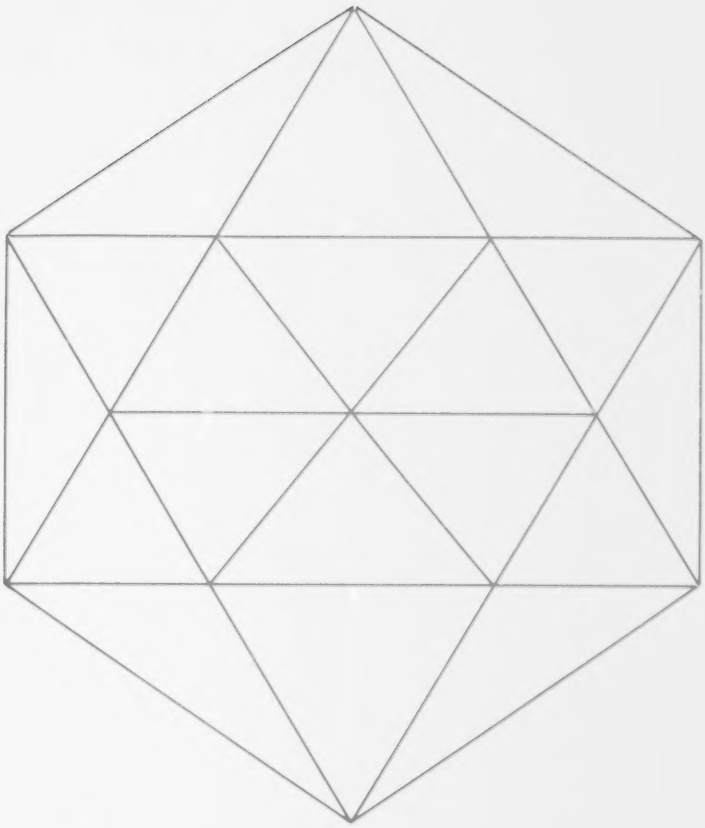

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FOCUS ON:

SELECTING AND USING YOUR SCHOOL BOARD ATTORNEY

SELECTING AND USING YOUR SCHOOL BOARD ATTORNEY

New Jersey School Boards Association
Focus On School Law Series
FOCUS ON: SELECTING AND USING YOUR SCHOOL BOARD ATTORNEY

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3

TABLE OF CONTENTS

Acknowledgement 7
Introduction 9
SELECTION OF THE SCHOOL BOARD ATTORNEY 10
The Job Description 11
Litigation 11
Attendance at Board Meetings 12
Consultation and Advice 12
Preparation or Review of Documents 13
Qualifications 13
Obtaining Applications 14
Interviews 15
Checking References 16
WORKING WITH THE SCHOOL BOARD ATTORNEY 16
COMPENSATING THE BOARD ATTORNEY 19
The Written Agreement 21
What Districts Spend 21
ASSISTANCE FROM NJSBA STAFF 22

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INTRODUCTION

The last several decades have spawned a tremendous increase in the importance of the law in education decision-making. Today, almost every decision made by a local board or administrator has at least some important legal ramifications.

The reasons for this growth are varied. The legal rules governing school district operations are simply much more numerous than ever before. Although the State has given local boards broad discretionary authority in most school district operations, in recent years the State has increasingly limited that authority by adopting new laws and regulations setting out new procedures, particularizing the rights of employees, parents and students and even entering areas such as curriculum which have long been matters left largely to local prerogative.

Other factors contributing to the growth of school law are the advent of collective negotiations in the public sector and the greater inclination of people to resort to legal action to remedy both private wrongs and broad social problems.

This growth of law and litigation means increased scrutiny of school board and administrative decisions and it also means increased legal expenses by local school districts. It is, therefore, critically important that school districts secure good legal advice and representation.

This pamphlet is designed to address this need of the NJSBA membership, by providing information on how to select, compensate and work with your school board attorney. We have also attempted to answer some very practical questions by reporting the results of an NJSBA survey of chief school administrators conducted during the spring of 1982 on the subject of school district legal services. The large number of responses (417 districts) may indicate a high degree of interest in this topic and enables us to give districts reliable information about the practices of other school districts. We urge you to compare your own district's situation with the survey results and with the advice contained in this pamphlet and to ask if your district is doing the right things to maximize the benefits it receives from employing counsel. The survey results can be found at the end of this pamphlet and are referred to throughout the text, *e.g.* "see Question 1."

SELECTION OF THE SCHOOL BOARD ATTORNEY

Selecting a school board attorney can be one of the local board's most important decisions. Securing quality legal representation, advice and service can often be the deciding factor in developing sound and efficient educational management practices and better personnel and community relations.

Our survey of local districts shows that legal expenses are a significant expenditure for most districts, with an estimated total cost to all districts of over $3 million in 1981-82. As might be expected the amount paid by a district generally increases with that district's total current expense budget. The chart on page 24 indicates that general trend.

Although most districts pay according to this general trend, 20 percent of all responding districts report legal service expenses which far exceed the trend for districts of their budget size, some paying as much as 1 percent of their total CEB for legal services. Most of these higher expenses can be accounted for by greater amounts of litigation in these districts, since total costs also depend heavily on the number of legal cases pending during the year:

TOTAL COST OF LEGAL SERVICE (1981-1982)

	Under $5,000	$5–10,000	$10–20,000	$20–50,000	Over $50,000
Median no. of legal cases* (1981-82)	1	2	3	4	5

This chart shows that, for example, if a board was involved in three legal cases, it was likely to have paid a total of $10-$20,000 for total legal costs, regardless of district size. The fact that legal costs can be substantial, particularly if a district finds itself involved in frequent litigation, underscores the importance of securing capable legal advice and representation.

Not all attorneys and law firms have the same level of expertise in representing school districts, the same level of service and accessibility or the same customary fee arrangements and rates. When a board is in the process of selecting a school attorney, it makes good common consumer sense to take the time to do the job thoroughly and knowledgeably.

Attorney advertising has traditionally been restricted and, as with other professions, many clients have found it difficult to make a thorough examination and comparison of available services. Coupled with this difficulty is the traditional aura surrounding the legal profession; despite the modern trend toward consumerism, many clients are still reluctant to subject lawyers to the questions and critical comparisons necessary for a rational choice.

School districts which go through a lengthy and complex process for selecting a superintendent may hire a new attorney with little or no inquiry or comparison of candidates. This lack of formal process is totally unnecessary and also unwise.

By going through a rational selection process, the board can assure itself that it has made the best possible choice and develop a greater level of confidence in

*does not include cases in which boards are represented by insurance carrier attorneys.

the attorney's advice and skills. The attorney selected should also appreciate a rational process as evidence that his/her ongoing relationship with the board, his/her evaluation, and the board's decisions on continued employment will also be rationally based.

Ideally, the board should use as much care in selecting its attorney as it does in selecting a candidate to fill any other high level administrative position.

The Job Description

The first step in the selection process should be the development of a job description itemizing the duties and qualifications for the position. Although most districts would not think of employing administrators without a job description, only 9 percent of the districts responding to our survey reported that they had developed an attorney job description. (See Question 2.) Without a job description, it is difficult to understand how either the board, the attorney or administrative staff know even the most basic parameters of the working relationship. Is the attorney, for example, expected to advise the board on new decisions or laws which may affect the district, and, if so, which members of the board or staff is the attorney to advise?

Perhaps one major reason for the rarity of attorney job descriptions is the fact that many districts have attorneys who have served for many years and may have developed an unwritten understanding about duties and procedures to be followed. (The median length of attorney employment in districts responding to our survey is seven years, with 30 percent of districts reporting service between eleven and forty years! On the other hand, 26 percent of the districts reported having attorneys employed for three years or less, many of which are presumably functioning without a job description.) Such an informal arrangement is fine so long as everyone has the same understanding of what is expected in the attorney-board relationship. It is strongly advised, however, that a district with such an arrangement put the details of that arrangement in writing for reference as a job description at a future time, should it be needed.

Although the legal needs and monetary resources of school districts vary widely, the job description should include certain duties as a minimum. (While this booklet was still in production the NJSBA was in the process of collecting available job descriptions from districts and compiling a sample job description. By the time of publication, this material should be available upon request.)

Litigation Legal representation in judicial and administrative proceedings is, of course, the role most commonly associated with the board attorney. It is not unusual for one or more employees to be named as co-defendants in a legal proceeding against the board. Where the board's interest and that of the employee do not conflict, the board attorney (or the insurance company's attorneys, if coverage is applicable) generally represents both the board and the employee; however, if an adversary relationship exists between the board and the employee, the attorney represents only the board.

In our survey, the median number of legal cases responding districts were involved in during 1981-82 was two cases. Some 22 percent of districts reported one case and a surprising 25 percent reported no litigation at all during the year. Some districts, primarily larger districts, litigate more; 7 percent of the districts reported involvement in between seven and 15 cases, 2 percent reported between 17 and 60 cases and one district reported 100 cases!

These figures demonstrate that the litigation function may be more or less important compared to other aspects of the attorney's role depending on the amount of litigation a district normally has.

Attendance at Board Meetings Legal questions could arise at any meeting of the board, and there are definite advantages in having the attorney there to properly advise the membership, perhaps thereby averting later legal problems and expense. One of the most important functions of the board attorney is to provide early advice to *prevent* the district from getting into legal trouble. If the attorney is not present, he or she may be consulted too late to prevent a decision from leading to serious legal difficulties. Attendance at meetings also acquaints the board attorney with current issues and with the operations of the district and can enable the attorney to identify potential legal problems before they actually surface.

The survey indicates that for those primarily small districts paying $10,000 or less on legal services in 1981-82, only 26 percent reported that their attorneys' duties included attendance at all board meetings (in contrast to 50 percent for districts paying more than that amount). Overall, 33 percent of the districts reported attendance at all meetings and 48 percent reported attendance at some meetings. It is presumed that attendance is on request or very rare in the remaining districts (almost 20 percent). (See Question 7.)

Unfortunately, attorney attendance at all meetings can be prohibitively expensive for many boards, particularly those which pay for this service at an hourly rate. The tendency is to eliminate attorney attendance at board meetings in order to save money. Such a practice obviously courts disaster.

With proper planning it may not be necessary to require the attorney's presence at *every* board meeting. While the attorney should obviously be present at a meeting at which the board is considering the certification of tenure charges, it is probably not necessary in most instances that the attorney be present at a public meeting devoted solely to a discussion of curricular matters. What the board should attempt to do is anticipate those agenda items which have legal implications. At the very least, the attorney should be given an advance copy of the agenda so that he or she can bring such items to the attention of the superintendent and the board. In many cases consultation with the attorney prior to the meeting will suffice and actual attendance may not be necessary. Furthermore, a retainer agreement which includes attendance at some or all board meetings for a reasonable lump sum fee can be the best arrangement for any size board. (See more on retainer agreements in Part IV.)

Consultation and Advice This is probably the board attorney's most important function, yet boards frequently underutilize their attorneys in this area of responsibility and may underestimate its critical value to district operations. Advice sought and rendered at an early stage of a developing situation can be the key factor in preventing irreversible mistakes and the subsequent costs (as well as the time and turmoil of litigation).

Sometimes boards look to their administrators for advice in school law, but ultimate reliance for legal advice must be placed on the school board attorney. The administrator's knowledge is important primarily to recognize potential legal issues and problems as they arise and to know when the attorney's advice is needed.

The job description should specify who may seek the written or oral advice of the board attorney. In our survey, 97 percent of the districts reported that the attorney provides advice to the chief school administrator, 46 percent to other

administrators, 67 percent to the board president and 45 percent to all board members. (See Question 7.)

Particularly in a small district, the board may wish to require that all staff requests be made through the chief school administrator. The advantage of this procedure is a better informed chief school administrator, and it also prevents duplicate requests. Boards may also want to limit opinion requests to the board president, the board of education as a whole or to any individual board member which the board may designate. These procedures can be helpful in controlling legal costs and preventing advice from having a divisive influence on board operations.

Regarding the legal aspects of collective negotiations, our survey shows that school board attorneys also represent the district in negotiations in 22 percent of all responding districts. Where board members act as their own negotiators, and even where the board hires a professional negotiator who may or may not be an attorney, the board attorney should be available to provide advice on such matters as the legality of proposals. The board attorney should be kept up to date on negotiations and grievance matters, and should be provided with copies of collective bargaining agreements in the district.

Preparation or Review of Documents The board attorney should either draft or review all contracts, bid specifications, legal notices and board policies. Although these are usually routine matters that attorneys traditionally handle, boards may in many instances overlook the value and necessity for these services. For example, even if the district is presented with a form contract for goods or services, it need not be accepted as is; the board attorney's review may disclose problem clauses which can be changed by negotiation with the vendor.

Almost all board policies, also, have some legal ramifications, and yet only 73 percent of districts in our survey report that the attorney reviews either all policies or selected policies. (See Question 7.) It is extremely inadvisable for a district to neglect the legal aspects of its policies. Policies, as the framework for district action, can mean the difference between a smooth, efficient school system and a confused, contentious organization.

Qualifications

The board of education should also determine the qualifications for the position of board attorney. As an absolute minimum, the prospective board attorney should possess at least a moderate degree of knowledge, training or experience in the laws applicable to school districts. Boards should not assume that all attorneys have the necessary knowledge by virtue of being admitted to the bar. Courses on education law and public sector labor law are a rarity in law schools. Even a prestigious or "name" law firm may not have the kind of special expertise desired by local school districts.

The survey results demonstrate the importance of securing a board attorney with special knowledge or experience in these areas. Districts rated the advice and service of their current school attorneys as follows:

Excellent	Very Good	Satisfactory	Poor
51%	31%	15%	2%

Districts also reported that their attorneys have the following levels of knowledge

or experience in school law:

Substantial	Moderate	Little
59%	35%	6%

Looking at these two factors together, the survey shows that the rating received by attorneys is very closely associated with their level of knowledge or experience in school law issues. Ninety percent of those boards which gave their attorneys a rating of "excellent" also reported that the attorney had substantial knowledge/experience. On the other hand, no district employing an attorney with substantial knowledge/experience rated that attorney as "poor". Of the 24 districts reporting their attorney's as having little knowledge and experience, 17 (or approximately 71 percent) rated them as "satisfactory" or "poor".

In short, districts seem to be most satisfied with attorneys having at least a moderate degree of knowledge or experience in school law issues. In fact, a large number of the responding districts took time to make a handwritten comment on our survey form emphasizing the advisability of retaining attorneys with knowledge of this specialized legal area.

Obtaining Applications

There is no legal requirement that the position of board attorney be advertised or that bids be solicited. The NJSBA, however, recommends that the board take steps to adequately advertise the opening and freely invite applications from interested attorneys and firms in order to attract the greatest number of qualified candidates.

There are a number of methods by which to accomplish this objective. For maximum publicity, it is suggested that an advertisement be placed in the *New Jersey Law Journal*, a weekly publication read by virtually every attorney in the state. Boards desiring to advertise the position of school board attorney should send a written classified advertisement directly to the New Jersey Law Journal, Box 50, 240 Mulberry Street, Newark, New Jersey 07101 or contact the NJSBA Legal Department for assistance.

If the school board does not wish to directly advertise the position, it can simply contact a number of attorneys directly and invite them to submit applications. The NJSBA maintains a list of attorneys and firms currently representing school boards in each county. The NJSBA, in accordance with policy adopted by the Board of Directors, cannot recommend particular candidates and makes no judgments or evaluations concerning any of the attorneys listed. These lists, nevertheless, are useful in identifying those attorneys who are currently practicing school law. The lists are available upon request to any board of education from the NJSBA Legal Department and interested boards can call (609) 695-7600.

Our survey shows that only 17 percent of the responding districts have chosen to solicit applications either by placing ads in area newspapers or the *Law Journal* or by obtaining the NJSBA list. (See Question 2.) Instead, almost one-half of the districts report that the attorneys contacted were only those known locally by board members and no other method of inviting applications was used. This is unfortunate; although there is nothing wrong with inviting locally known attorneys to apply—in fact, this can be an excellent method of getting a number of capable applicants—*it should not be the exclusive method*, nor should the board

be content with inviting a single applicant known personally to its members. It should go without saying that political alliances should play no part in the selection of a board attorney. Both the board's chances of securing the best possible legal help and also its confidence in its final selection are significantly enhanced if a broad search is conducted as part of a rational selection process.

Interviews

Once the applications have been reviewed, the school board (or a committee of the board) should arrange interviews with those candidates who appear to be the best qualified. The interview process provides the board with an excellent opportunity to meet with each candidate and discuss his or her qualifications, accessibility, familiarity with school board operations and fee arrangements. The board may also want to solicit the candidate's suggestions for procedures to be followed in providing legal advice, the scope of additional services available from the attorney as well as other topics relevant to the selection decision.

Boards should not be reluctant to conduct interviews (about 35 percent of districts do so at present) and to ask the kind of questions necessary to determine the attorney's style and ability to communicate and work cooperatively with the board and its chief administrator. Questions can be prepared in advance, and many of the questions usually asked of candidates for top administrative positions may be equally appropriate for the school attorney.

The representation of school boards involves special expertise in an area of the law not commonly dealt with by attorneys in general practice. Our survey indicates that board satisfaction with the board attorney was directly related to the attorney's experience in school law. Thus, it is important for the board to inquire into a candidate's school law background.

An obvious way of examining an attorney's background in school law is to ask what other boards he/she currently represents or represented in the past. Another useful indicator would be membership in one or more school law related groups, such as the New Jersey Association of School Attorneys, the NJSBA Associate Membership Program for School Attorneys (AMPSA), Council of School Attorneys of the NSBA, the National Organization on Legal Problems of Education (NOLPE), the Educational Negotiators Association (ENA). Membership in such organizations demonstrates the attorney's desire to keep up with the latest trends in issues affecting education. Similarly, the presence of school law related materials in the attorney's library indicates the attorney's ability to research and respond to questions, as well as his/her commitment to remaining well-informed. At a minimum, the attorneys should have his/her own copy of the *Index to School Law Decisions* (published by NJSBA) with easy access to the decisions of the Commissioner of Education and State Board of Education, which are compiled in bound and looseleaf volumes collectively called *School Law Decisions*. Also, if the attorney will be involved in labor relations, he/she should have a copy of the *Index and Analysis of PERC Decisions* (published by NJSBA), with access to the *New Jersey Public Employment Reporter (NJPER)*, which compiles decisions of the Public Employment Relations Commission.

Boards may also wish to ask for a summary of the candidate's background in school law issues and for a list of school law cases handled. The latter question is helpful in determining the relevance of the candidate's experience and also to identify former clients who can be contacted for references.

Checking References

The attorney's references, like those of applicants for an administrative position, should be carefully checked. An excellent source of information is the attorney's other or former clients—particularly school boards. Were they satisfied with the services and representation provided? What were the fee arrangements? What functions did he perform for the board? You may also wish to ask more detailed questions focusing on specific concerns of your board such as the role assumed by the attorney or the attorney's ability to stick to objective legal advice and not merely provide personal opinions on policy matters.

In short, the references of other school board clients can be one of the most valuable tools in selecting a board attorney. Attorney candidates should be more than willing to provide the names of former clients to assist you in this process.

It is important to recognize in checking references that there is no value in asking an applicant or a reference whether a particular case handled by the applicant had been won or lost, or for an estimate of an attorney's overall "success rate." Because cases vary so widely on their individual merits, it is possible for a well-handled case to be lost and a poorly handled case to be won. A board's interest lies in knowing that an attorney is experienced in school law and that his former and present clients are satisfied with his representation.

WORKING WITH THE SCHOOL BOARD ATTORNEY

Once the board attorney is hired, there is a lot board members and administrators can do to make the most of the employment relationship and maximize the benefits of employing legal counsel. Some suggestions follow.

Seek Advice Early As stated previously, the most important benefit of having a board attorney is to prevent legal errors by the board and school administration. Many legal problems can be avoided if legal advice is sought *before*, not after, action is taken.

If the advice is sought only after a potential problem has developed fully and been acted upon, the attorney cannot provide the best possible assistance to the district. Irreversible mistakes may have been made, and the attorney, in trying to disentangle the district from resulting legal problems, is hampered by trying to reconstruct events and determine exactly what actually took place and why. This delay not only makes the attorney's job more difficult, time-consuming and costly to the district, but also can mean a complicated effort to put the district back on the right track and salvage the matter, if it is salvageable at all. Obviously, it enormously increases the odds that the district will become involved in costly litigation.

Give the Attorney Adequate Time to Respond Keep in mind that many legal questions require extensive research. Because of this, boards should scrupulously avoid the all-too-common practice of asking the attorney to answer a complex or novel legal question immediately. If the board turns to the attorney with such a question during a meeting, it is unfair to the attorney and substantially increases the board's chances of getting an inaccurate or incomplete response. The attorney

may wish to appear prepared to answer the board's questions and may be reluctant to say that it "requires research". Even the most knowledgeable board attorney will provide better advice if given some chance to consider various statutes and court precedents and prepare a more fully developed answer.

There are times, of course, when issues unavoidably arise quickly and without warning—an administrator's need for quick, informal advice on searching a student, or the board's need for advice on the legality of going into private session during a board meeting. In those situations, the attorney can and should be asked to provide immediate advice.

In most situations, particularly if the board and administration make an effort to anticipate legal questions, the attorney can be given time to prepare a complete response. The attorney will use this time to find out the complete facts, ask questions, do needed legal research and prepare a thorough opinion.

Help the Attorney Assume the Proper Role Generally speaking, local districts, like all law clients, should follow the advice of their attorneys; however, legal advice is just that—advice—and the board and administrators should neither try to nor let the attorney make decisions for them. The final decision is up to the board and it should be made by balancing the advice of counsel with the board's own educational judgment. Often a decision is ultimately one of policy and can be based on a variety of other non-legal considerations, such as personnel or public relations.

Where the attorney advises that the legal picture is not clear or that the district has certain options, the board may decide to choose the best overall option, even if it has certain legal disadvantages. For example, the board attorney may advise that the district is not legally obligated to provide an employee or citizen with a hearing before the board—the attorney may even advise that such a hearing is unwise from a legal standpoint—and yet the board may decide to allow the hearing to serve other policy objectives.

In other instances, the attorney may advise that the law is clear and that the board absolutely must pursue a particular course. Boards ignoring such advice, even for seemingly important policy purposes, may be courting legal disaster.

Separating policy determinations from legal ones can be a difficult problem. Board members may sometimes forget the proper role of a legal advisor and seek the attorney's personal opinions on non-legal policy matters under discussion by the board. Board members may encourage this practice by trying to get the attorney to side with them on a particular issue. This practice puts the attorney in a difficult and sometimes unwelcome position. The attorney's personal opinion might also be misinterpreted as a legal opinion and therefore be given inordinate weight. On the other hand, so long as it is clear to all involved that policy matters are being discussed, the opinion of an experienced board attorney can be valuable as one source of information upon which the board will make a decision.

A problem can also occur with board members who also happen to be attorneys. Although not serving as the board's attorney, they may be invited to give or may volunteer their legal advice on a question before the board. Even if the board member/attorney states what is clearly a personal viewpoint on an issue, board members may tend to believe that the viewpoint has the same authority as a legal opinion.

These problems may not have a clear solution, but they can be minimized by a frank discussion among the board, and by reminders that both formal and informal advice should come only from the attorney retained by the board. Adherence

to a well developed board policy on legal advice avoids personal conflicts, prevents boards from misconstruing personal opinions as legal ones and allows the board to get the full benefit of retaining its own attorney, who is or should be a specialist on school legal issues.

Work on Better Methods of Communication and Evaluation Most legal clients find it difficult to evaluate the services of their attorney. Many local boards have retained the same attorney for many years and have developed a good working relationship and a confidence in the attorney's work. In such instances formal evaluation is not essential to maintaining that relationship.

If a board has recently hired a new board attorney, it may wish to consider adopting a somewhat formalized evaluation process, similar to that used for the district's administrative staff. Such a process is not difficult to adapt to an attorney, and many of the same evaluation criteria may be appropriate. Some additional criteria the board might want to include are:

1. the accessibility of the attorney (a problem noted by several districts answering our survey);
2. the attorney's knowledge and soundness of advice (perhaps difficult but not impossible to evaluate);
3. the degree of rapport and cooperation with board and administrators;
4. the extent to which the attorney's advice is solution-oriented rather than simply stating what the law prohibits (however, the extent to which opinions are favorable to what the board wants to do should *not* be a criterion);
5. the thoroughness of research;
6. clarity and thoroughness in explaining the legal reasoning behind both oral and written opinions;
7. the ability to keep policy and legal issues separate; and
8. the extent to which the attorney provides sufficient information to the district and keeps the board informed of the progress of ongoing legal problems or litigation.

This list is not exhaustive and merely suggests some possible criteria for evaluating the school attorney. Each district will have individual concerns and should develop its own criteria.

Even if the district does not develop a formal checklist or evaluation process per se, it should at least periodically (perhaps prior to the annual reappointment) discuss and review with the attorney services provided, fees charged and like issues. If such review and discussion does no more than stimulate ideas for better coordination or communication, it has served a valuable purpose. For example, a district which usually has litigation pending may feel a need for more information on the progress of litigation and may decide to ask for regular reports from counsel on this subject. Such reports would also serve as a basis for properly evaluating the attorney's litigation services and would be far superior to simply looking at the outcome of the case.

What To Do if Problems Persist If the district is dissatisfied with aspects of its attorney's services, knowledge, procedures, representation or fees, the informal or formal evaluation process should elicit a discussion of and a suggested solution to these problems. Even if a board chooses not to evaluate the attorney in

any way, the board should always discuss problem areas directly with the attorney before considering the attorney's dismissal.

Such discussions are not simply a matter of fairness to the attorney; if problems develop, conferring with the attorney about them may lead to changes such as different fee arrangements or better procedures that will resolve the difficulties and enable the board to avoid unnecessary turnover (a problem noted by several districts in our survey). All aspects of an attorney's services, including fees, are usually negotiable, and boards should not be reluctant to try to work out better arrangements with their attorneys.

If problems are discussed and not resolved or if they persist despite attempts to correct them, the board should then consider hiring a new attorney. If an attorney is to be dismissed, the attorney should be told so directly and given an explanation of the reasons. Such a procedure is fair, more rational and conducive to good overall personnel relations. If the board has previously discussed the problems with the attorney, it should be possible to make the actual dismissal amicably with a smooth transition of services and case files to the new attorney.

COMPENSATING THE BOARD ATTORNEY

With spiraling costs in nearly all aspects of school district operations, board members are understandably concerned with the cost of legal assistance. There are a number of compensation plans which are commonly used by school districts. (See Question 5.)

Full-Time Counsel A few of the larger boards employ full-time counsel to advise and represent the board. This approach has significant advantages in terms of the attorney's accessibility, familiarity with school district operations, and ability to concentrate on school law and the district's legal needs. For most boards, however, the salary and overhead costs of maintaining a full-time counsel's office are in excess of what would be expended by retaining private counsel.

Our survey shows that only 6 districts (1 percent) employ full-time counsel and 4 of these districts have current expense budgets of $10 million or more (large districts usually have a greater demand for legal services). Districts choosing this option should be prepared to pay a counsel's salary equal to that paid high level administrators with advanced degrees, the cost of usual employee benefits and also the costs of office space and secretarial assistance. If they are considering this option, boards should obviously compare their present annual expenditure for legal fees to the projected costs of salaries, benefits and overhead of full-time counsel.

General Retainer Agreements Under a general retainer agreement, the attorney contracts to provide the board with all necessary legal services for the period of the agreement for a predetermined retainer or fee. The legal services to be provided are all-inclusive, and the retainer is intended to compensate the attorney fairly for the anticipated services. The agreement should state in detail the scope of services to be provided—attendance at board meetings, rendering of formal written opinions and informal legal advice, representation in litigation, etc. The length of the list will obviously affect the size of the retainer.

A general retainer agreement has many of the same advantages as full-time counsel. The attorney is readily available to the board and key administrative staff for advice and assistance. The retainer justifies a substantial investment of time on the part of the attorney in school law generally and in the local district in particular.

General retainer agreements often provide that additional compensation may be paid for extraordinary services (e.g. an unusually long trial), and our survey shows that the general retainer agreement, either all inclusive or with additional compensation, is one of the most commonly reported methods of compensating school attorneys. Thirty-nine percent of all responding districts use one of the two forms of general retainer, but most of these districts report a clause providing for additional payment for extraordinary services. General retainers are common among districts of all budget sizes; it is the method most often used by all districts, except those with CEB's below $2 million (which generally use no retainer).

Limited Retainer Agreements Under these arrangements, the attorney receives only a nominal annual fee, but is separately compensated for services rendered during the course of the year in connection with particular legal services, including bond transactions, litigation, formal written opinions, etc. Once again, the agreement should specify the services to be provided under the retainer, and the exact basis for determining fees for additional services.

This type of agreement is fairly common among districts of all sizes. It is used by approximately 22 percent of all districts, except for districts with CEB's over $20 million (which most often use a general retainer).

No Retainer Many districts pay no set annual or monthly fee. Instead they simply pay on a fee-for-services basis at an hourly rate agreed upon with the board attorney.

Our survey shows that an hourly rate with no retainer is one of the most common methods of compensating board attorneys (38 percent of all responding districts). It is *the* most common method among small districts; 54 percent of districts with CEB's less than $2 million use no retainer. Of these small districts using no retainer, 74 percent report paying under $5,000 for legal services in 1981-82, and 23 percent paid between $5,000 and $10,000.

This method has the obvious advantage of assuring that the district pays *only* for services used. This arrangement is in contrast to any type of retainer agreement which involves some guesswork by both the attorney and the board in assessing how much legal work will be needed during the year and setting the retainer amount accordingly. If the amount of work is underestimated, the attorney may feel that he is being underpaid; if it is overestimated, the board may feel that the attorney is overpaid. Use of an hourly rate without a retainer avoids these problems.

Hiring an attorney solely on an hourly basis, however, has its pitfalls. Because the district pays only for actual services rendered, both board members and administrators may hesitate to contact the attorney and may seek legal advice too late or not at all. Similarly, an attorney may be hesitant to initiate a call to the district on a topic which may be of concern, since he may not want it to appear as though he is simply "padding" his bill. As stated previously, legal advice before action is taken is the board attorney's most important service and the one which can avoid costly mistakes by board and staff. Underutilization of the attorney in

an attempt to keep legal costs down can be disasterous as well as more expensive in the long run.

Recommendation In order to make most efficient use of the board attorney, the NJSBA strongly recommends that every board seek a fee arrangement which includes a retainer to cover telephone consultations at no additional charge per call. While the board is, of course, still paying for the phone consultations with a retainer agreement (by lump sum instead of hourly billing), the unhealthy incentive to avoid legal consultations in order to save money is eliminated, and the amount paid is one which has been predetermined by the board to be reasonable and necessary for the proper functioning of the district. Moreover, if at any time either the board or the attorney is dissatisfied with the amount of the retainer, it can be revised by mutual agreement.

Note that different fee arrangements can always be discussed by the board and its attorney. Boards should consider the advantages and disadvantages of the different arrangements which were discussed above and work out the type which best fits their own unique needs and resources.

Note too that, regardless of the type of fee arrangement currently in use by a board and its attorney, it is important to have a clear understanding of the exact services to be rendered and the manner in which fees are to be paid.

The Written Agreement

If the board employs an attorney on retainer, a written retainer agreement should be entered into. This agreement should be in addition to, and may incorporate, the job description adopted by the board. The written retainer agreement should go further and specifically set out the services to be performed as a part of the annual or monthly retainer fee and those for which additional compensation is warranted. It should, of course, specify the amount of the retainer and should also set out the hourly rate or other method of compensating for additional services not covered by the retainer. By deciding in advance and putting in writing all specifics of the employment relationship, the board and attorney will avoid misunderstandings and will clarify for all concerned, including new board members and staff, exactly what the attorney is to do in exchange for the retainer and what duties require or allow for extra compensation.

If a board employs its attorney on an hourly basis without retainer, it should still have certain matters reduced to writing. At a minimum, a written job description should be adopted and given to the attorney, and the board should specify, at least by written resolution, that these duties are to be performed upon request at a certain hourly rate.

What Districts Spend for Legal Services

Our survey of school districts produced a large number of comments regarding fees charged by attorneys. Comments ranged from "they charge a fortune" to concerns over what seems to be an increase in matters requiring legal assistance "at a time when districts can least afford it."

Whether or not concerns about legal costs are part of a more general concern about rising costs in all areas, it is clear that legal services do have important cost considerations for most boards. It was noted previously that legal costs are generally proportionate to the current expense budgets of districts, i.e. the higher

a district's CEB, the higher the legal costs. This is not surprising, since districts with higher CEB's generally have more employee, student, contractual and other matters which usually increase the need for legal services.

For example, the chart on page 24 shows that 101 districts (73 percent of all districts with CEB's less than $2 million) report p. ying less than $5,000 for legal services in 1981-82. It is easy to see that total costs can be much higher, primarily for larger budget districts. Total amounts paid also can vary based on factors such as the number and type of duties performed by the board attorney and the amount and complexity of litigation in which a district is involved.

A Few Additional Words About Costs

Regardless of what a district pays or the type of fee arrangement it has, costs may be a concern due to budgetary constraints. Fees charged local districts by attorneys do vary (survey responses indicate hourly rates averaging between $50 and $75 per hour), and districts can compare costs in selecting a new attorney.

Board members, however, should keep in mind several critical factors in making cost comparisons:

- While the most expensive or prestigious attorney may not be the best for the district, the choice of an attorney should not be based solely or even primarily on the differences in fees charged. As stated before, specialized knowledge or experience in school legal matters should be the single most important criterion.
- Keep in mind that hourly fees and retainers buy much more than the attorney's time. Out of fees received, the attorney must pay for things such as office space, secretarial services, office equipment and expensive legal library materials. Where a board hires full-time counsel, these additional costs must be paid totally by the board.
- Money spent for early legal advice may save the board substantial sums in the long run. Recognize the importance of preventive legal services and do not skimp on this type of expenditure.
- Monitor your legal expenses. Ask for rough cost estimates before making a decision to pursue litigation or take an appeal. Request billing on a monthly basis and ask the attorney to provide a detailed, itemized statement of services rendered. These methods will enable the board to know exactly the type and amount of services being purchased and will also assist in monitoring expenses for budget limitations.

ASSISTANCE FROM NJSBA STAFF

The Association maintains a staff of professionals who are always willing to assist boards in solving and preventing problems associated with all aspects of governing a school district. It must be stressed, however, that the only source of legal advice must be the board attorney.

From a practical standpoint, relying on the board attorney is the best assurance of receiving the most accurate advice in a specific situation. Because of the board attorney's familiarity with the district and its operations, policies and past prac-

tices he/she is in the best position to assess all the relevant facts in formulating a legal opinion. Advice sought from a source other than the board attorney must necessarily be based upon a synopsis of the facts which are then viewed in isolation from other conditions in the district. Inevitably, an essential fact or condition is overlooked under these circumstances, and what might be the correct advice based on this incomplete set of facts ends up being the wrong advice for the district.

On the other hand, a board member is wise to gain as much knowledge as possible about the overall duties and limitations of his/her office so that informed decisions can be made. Association staff is an excellent source for this kind of information. In particular, the field service representatives (FSR's) should be a board member's or administrator's first source of information on nearly any type of question. FSR's have wide ranging knowledge and experience on the issues facing school district leadership, and can often provide all the information needed to answer a question or solve a problem. An FSR will also readily recognize when a problem needs the attention of a specific NJSBA department such as Labor Relations or Management Information, and when a problem should be referred to the board attorney.

The NJSBA Legal Department can play an important role when there is a need for the board to consult its attorney. Any board attorney can contact the Legal Department to learn the latest developments on a particular issue or just to get a second opinion on the best course of action to take in a specific situation. The extensive files, research materials and school law expertise available at the NJSBA Legal Department can provide a board attorney with all the tools necessary to make the most informed analysis of a given problem. In turn, the board can save substantial sums in legal research costs if the board attorney is able to locate the key decisions, statutes and regulations concerning a particular issue with just a phone call to the Legal Department. Boards should make certain their board attorneys are aware of this service.

It must also be pointed out that the legal staff of the NJSBA cannot advise board members or administrators directly. Legal advice can only be provided through the board attorney.

There are two reasons for limiting NJSBA legal advice to board attorneys. First, this arrangement has been a longstanding policy set by the Board of Directors as a means of making the most appropriate and efficient use of staff. Second, this policy has recently been mandated by Supreme Court decision. In a case entitled *In re Education Law Center*, 86 *N.J.* 124 (1981), the Court ruled that an association employing attorneys could not use its legal staff to provide legal assistance to individuals other than the association itself. This prohibition even applies to members of the association (such as school boards) since there is the *potential* for a conflict of interest whenever an attorney owes loyalty to both the association which employs him and another individual to whom he is providing advice and assistance in an attorney-client relationship. Of course, assistance can be provided by NJSBA legal staff directly to board attorneys because there is no attorney-client relationship in a consultation between attorneys. It is through its service to board attorneys that the NJSBA helps school districts most directly in securing the best legal advice and reduced legal costs.

COMPARISON OF DISTRICTS BASED ON YEARLY COST OF LEGAL SERVICES AND CURRENT EXPENSE BUDGET

	SIZE OF CURRENT EXPENSE BUDGET					
Total Cost of Legal Services (1981-82)	less than $2 M	$2 M to $5 M	$5 M to $10 M	$10 M to $20 M	over $20 M	Totals
Over $50,000	0 (0%)	0 (0%)	1 (1%)	1 (2%)	9 (47%)	11
$20,000 to $50,000	1 (1%)	3 (2%)	13 (16%)	17 (40%)	8 (42%)	42
$10,000 to $20,000	5 (4%)	25 (20%)	25 (30%)	13 (30%)	2 (11%)	70
$5,000 to $10,000	32 (23%)	41 (33%)	26 (31%)	12 (28%)	0 (0%)	111
under $5,000	101 (73%)	54 (44%)	18 (22%)	0 (0%)	0 (0%)	173
Total Number of Districts Reporting	139 (101%)	123 (99%)	83 (100%)	43 (100%)	19 (100%)	407

(Note: Percentages are rounded and therefore may not total 100%.)

(Note: Districts with "no response" for these items were excluded from these evaluations.)

% = Percent of districts in each CEB category

M = Million

SURVEY OF ALL BOARDS
CONDUCTED 6/82 (417 RESPONDING)

NOTE: Percentages may total over 100% in some questions because of multiple responses.

1. How many years has your present school board attorney been employed by your district? — Median—7 years

2. Which of the following methods have been used to select/reappoint your present school board attorney? (check as many as apply)

   A. Advertised in area newspaper — 10%
   B. Advertised in New Jersey Law Journal — 2%
   C. Obtained NJSBA list of school board attorneys — 5%
   D. Attorney was known locally by board members — 71%
   E. Checked with attorneys' other clients — 19%
   F. Prepared a job description for school board attorney — 9%
   G. Attorneys were personally interviewed — 35%

3. Does your present school board attorney have experience or special knowledge in the field of school law? (check one)

   A. Substantial experience or knowledge — 59%
   B. A moderate degree of experience or knowledge — 35%
   C. Little experience or knowledge — 6%

4. How would you rate your present school board attorney's advice and service? (check one)

   A. Excellent — 51%
   B. Very Good — 31%
   C. Satisfactory — 15%
   D. Poor — 2%

5. What type of fee arrangement do you have with your present school board attorney? (check one)

   A. Attorney is paid as a full time counsel (part of district's professional staff) — 1%
   B. Attorney is paid a general retainer with a set annual fee for *all* legal services — 4%
   C. Attorney is paid a general retainer with an agreement to provide *additional* compensation for extraordinary services — 34%
   D. Attorney is paid a limited retainer (a nominal annual fee plus additional compensation for actual services rendered) — 22%
   E. No retainer; attorney is paid only for actual services rendered — 38%

6. What is the total amount your district expects to pay for all legal services for fiscal year 1981-82? (check one)

A. under $5,000	42%
B. $5,000—$10,000	27%
C. $10,000—$20,000	17%
D. $20,000—$50,000	11%
E. over $50,000	3%

7. What duties does your school board attorney perform? (check as many as apply)

A. Attendance at *all* board meetings	33%
B. Attendance at *some* board meetings	48%
C. Advice on legal questions to *chief school administrator*	97%
D. Advice on legal question to *other school administrators*	46%
E. Advice on legal questions to *board president*	66%
F. Advice on legal questions to *all board members*	45%
G. Review of *all* policies	16%
H. Review of *selected* policies	57%
I. Preparation or review of legal documents	90%
J. Representation in negotiations	22%
K. Representation in litigation	88%
L. Other (please describe)	3%

_____

_____

_____

8. In how many legal cases was your district directly involved during fiscal year 1981-82? Median—2

Of this total number, how many cases involved: 1,256—total

A. School Law	636 (51%)
B. Labor Law	337 (27%)
C. Liability or Workers Compensation Insurance	208 (17%)

9. Do you have any comments on the selection, services or compensation of local school board attorneys?

_____

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10. Please indicate the approximate size of your district's current expense budget (for the 1981-82 year) by checking *one* of the following:

A. CEB less than $2 million	34%
B. CEB between $2 million and $5 million	30%
C. CEB between $5 million and $10 million	20%
D. CEB between $10 million and $20 million	11%
E. CEB over $20 million	5%